

STATE OF MICHIGAN
COURT OF APPEALS

JOSEPH AQUILINA and JOHANNA
AQUILINA,

UNPUBLISHED
April 24, 2012

Plaintiffs-Appellants,

v

No. 300712
Ingham Circuit Court
LC No. 09-000711-CZ

FIFTH THIRD BANK,

Defendant-Appellee,

and

FIFTH THIRD BANK INVESTMENT
ADVISORS, FIFTH THIRD BANK WESTERN
MICHIGAN, FIFTH THIRD PRIVATE BANK,
GLEN JOHNSON, JOSEPH MURPHY,
JEFFREY STEEBY, SUSAN VOGEL
VANDERSON, and JAMES WARD,

Defendants.

Before: SAWYER, P.J., and WHITBECK and M. J. KELLY, JJ.

WHITBECK, J. (*concurring in part and dissenting in part*).

In this contract interpretation case, the majority affirms the trial court's decision that a managed IRA agreement executed between the parties was the document that controlled the parties' relationship. I agree with that portion of the majority's decision. However, the majority reverses the trial court's decision with regard to Fifth Third Bank's duty to follow the Aquilinas' instructions. The majority concludes that summary disposition was not appropriate because there are unresolved material questions of fact regarding whether Fifth Third Bank was required to follow the Aquilinas' instructions.¹ On this point, I disagree. Rather, I would affirm the trial

¹ See MCR 2.116(C)(10) (stating that a party may move for dismissal of a claim on the ground that there is no genuine issue with respect to any material fact and the moving party is entitled to judgment as a matter of law).

court's finding that there was no genuine issue of material fact that Fifth Third Bank did *not* have a duty to follow the Aquilinas' instructions.

When the Aquilinas signed the governing document—the 2002 managed IRA agreement—they chose the following option regarding Fifth Third Bank's investment management authority:

I authorize Trustee to exercise the following level of investment management as directed below, including but not limited to the ability to *purchase, sell or retain account assets. . . .*

Full investment discretion to invest account assets . . . as it may deem proper and suitable *without any restrictions whatsoever, statutory or otherwise.*^[2]

The majority finds it significant that the parties gave conflicting testimony regarding the Aquilinas' ability to direct their account. However, in my opinion, the parties' testimony was not relevant when interpreting this unambiguous contract. A contract is ambiguous if the words may reasonably be understood in different ways.³ However, just because the parties themselves had different understandings of the contract language does not necessarily render clear language ambiguous.⁴ “‘This [C]ourt has many times held that one who signs a contract will not be heard to say, when enforcement is sought, . . . that he supposed it was different in its terms.’”⁵ As the majority points out, the past dealings of the parties can be relevant if widely acknowledged and mutually accepted.⁶ But, here, the fact that the parties actually disagree on Fifth Third's obligations evidences that any past dealing were not widely acknowledged or mutually accepted and therefore were not relevant. That is, there was no support that there was a meeting of the minds regarding the practical effect of the language.⁷

Absent ambiguity, a contract must be construed to adhere to its plain and ordinary meaning.⁸ And if the contractual language is clear, construction of the contract is a question of law for the court.⁹ Thus, here, where by the plain language of the managed IRA agreement, the Aquilinas gave Fifth Third Bank “[f]ull investment discretion . . . *without any restrictions whatsoever, statutory or otherwise*” to “*purchase, sell or retain account assets[,]*” I would hold

² Emphasis added.

³ *Universal Underwriters Ins Co v Kneeland*, 464 Mich 491, 496; 628 NW2d 491 (2001).

⁴ *Farm Bureau Mut Ins Co v Nikkel*, 460 Mich 558, 567; 596 NW2d 915 (1999).

⁵ *Id.*, quoting *Komraus Plumbing & Heating, Inc v Cadillac Sands Motel, Inc*, 387 Mich 285, 290; 195 NW2d 865 (1972).

⁶ *Butler v Wayne Co*, 289 Mich App 664, 677; 798 NW2d 37 (2010).

⁷ *Id.*

⁸ *Holmes v Holmes*, 281 Mich App 575, 593-594; 760 NW2d 300 (2008).

⁹ *Id.* at 594.

that there was no genuine issue of material fact that Fifth Third Bank did *not* have a duty to follow the Aquilinas' instructions.

I would affirm the trial court's decision in all respects.

/s/ William C. Whitbeck